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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

October Term, 1985

ROSEMARY LOOMIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTIONS PRESENTED FOR REVIEW

1. Where the district court erroneously construed Federal Rule of Criminal Procedure 30 to permit the prosecution to discuss a critical instruction in its closing argument while effectively precluding any discussion of an instruction on deliberate avoidance of knowledge in defense closing argument: (a) did the district court's actions violate Petitioner's due process right to make a meaningful closing argument and the due process right to balanced and reciprocal treatment of the prosecution and the defense; and (b) if these constitutional rights were violated, can the due process right to a fair trial be waived by silence as opposed to an explicit waiver?

2. Where Petitioner did not testify and there was no evidence that Petitioner deliberately avoided knowing of illegal activity, was it error for the district court to issue the so called *Jewell* instruction that the jury can find the requisite *mens rea* where a defendant deliberately closes his or her eyes to illegal activity, in violation of the general requirement of federal caselaw that the instruction on deliberate avoidance be given only where there is evidence that the defendant deliberately closed his or her eyes?

3. In the context of the random use of drug sniffing dogs, without probable cause or even a reasonable suspicion, to examine and determine the contents of hundreds of storage lockers which are located on private property and are protected against public intrusion by an elaborate security system, did the Ninth Circuit err in construing this Court's decision in *United States v. Place*, 103 S.Ct. 2637 as exempting all dog searches in private places from Fourth Amendment protection, in

conflict with the Second Circuit interpretation of *Place* in *United States v. Thomas*, 757 F.2d 1359 (1985)?[i]

4. Under this Court's decision in *Franks v. Delaware*, 438 U.S. 152 (1978), after submitting affidavits establishing critical material false statements does a defendant have the constitutional right to an evidentiary hearing at which they can present testimony and cross-examine prosecution witnesses who have filed conflicting affidavits, or can the trial court resolve significant factual disputes as to alleged *Franks* misrepresentations concerning the reliability of drug sniffing dogs by accepting the factual allegations in prosecution's declarations without considering live testimony or permitting cross-examination of affiants?[ii]

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[i]Petitioner Loomis incorporates by reference the discussion of this issue in the Petition for a Writ of Certiorari filed by Petitioner Jon Vermouth.

[ii]*Ibid.*

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ROSEMARY LOOMIS,

Petitioner,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Rosemary Loomis, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

JURISDICTION

The opinion of the Court of Appeals was filed August 9, 1985, and a petition for rehearing was denied on October 22, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254.

OPINION BELOW

The memorandum decision of the circuit court is set forth in the attached Appendix.

CONSTITUTIONAL PROVISION AND FEDERAL PROCEDURAL RULE

The Fifth Amendment to the United States Constitution and Rule 30 of the Federal Rules of Criminal Procedure are set forth in the attached Appendix.

STATEMENT OF THE CASE

A. Proceedings Under Appeal

On April 15, 1983, Petitioner Rosemary Loomis was arrested at 822 N. Voluntario Street, Santa Barbara, California, along with co-defendant Jon Vermouth, and was subsequently indicted in three counts of a ten-count federal indictment. At the first trial, Loomis was acquitted of one count charging possession with intent to distribute fifty pounds of cocaine found in a storage locker facility. The jury failed to reach a verdict on Count One, a charge of conspiracy under 21 U.S.C. §846 and on Count Three, possession with intent to distribute cocaine found at 822 N. Voluntario (21 U.S.C. §841). At the second trial, Petitioner was convicted of the remaining two counts on May 1, 1984. Her appeal was filed on June 18, 1984. The convictions were affirmed by the Ninth Circuit Court of Appeals in a memorandum opinion filed August 9, 1985 and a petition for rehearing and rehearing en banc was denied on October 22, 1985.

B. Statement of Facts

The developments relevant to the contested jury instruction on deliberate avoidance of knowledge, commenced on April 15, 1983, at 1:30 a.m., when Detective Leland Bentley executed a search warrant at

the defendants' residence at 822 N. Voluntario Street in Santa Barbara (RT 25).[1] Before entering, he saw Loomis' boyfriend Jon Vermouth, who was nude, pick up a metal suitcase containing a leather pouch with five and a half pounds of cocaine and run with it toward the bathroom. (RT 26-27) Although it would have been easy to determine whether Loomis' fingerprints were on the suitcase (RT 112), Bentley did not do so (RT 111-12).

The police entered the bedroom and arrested Loomis who was in bed. (RT 27) Some papers belonging to Loomis (RT 34) and $620.00 were found under the bed (RT 32). Police found $277.00 in Vermouth's pants (RT 32-33). A Privacom phone and four channel pocket scanner equipped to pick up the frequency of the Highway Patrol in San Jose (RT 588-89) were in the bedroom (RT 31). No contraband was found in the bedroom (RT 103).

In the kitchen the police found several baggies with small amounts of cocaine (RT 184-85, 187-88), and several envelopes with cash of up to $3,000 (for a total of $40,000) (RT 180-82).[2] Two footlockers containing 50 pounds of cocaine and a money counter were found in the trunk of a car registered to Vermouth located

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[1]The abbreviation "RT" refers to the Reporter's Transcript.

[2]Also found in the kitchen were receipts and applications for money orders purchased by Jon Vincent (RT 182-83) an alias of Jon Vermouth (RT 191-92), cashier's checks for Loomis purchased by Vermouth, a phone guard instrument to prevent third parties from listening in to phone conversations (RT 188), Loomis' address book containing 50 or 60 names in it (including some who were linked to Vermouth's drug activities) (RT 194-200), two keys to Vermouth's storage locker (RT 189-90) and a package containing 8 grams of cocaine addressed to Larry Dalinka in Hawaii with a return address of Richard Andrews in Santa Barbara (RT 184-85).

in storage locker #285 rented by Vermouth (RT 48-49).[3] Evidence found in a different storage locker rented by Loomis in January 1983 was also introduced. (RT 246-50).

C. Developments at Second Trial

In the factual circumstances described above, the prosecution sought a jury instruction to the effect that the jury could find the requisite *mens rea* for alleged violations of 21 U.S.C. §§841 and 846 if Loomis deliberately closed her eyes to illegal activity. Before closing arguments at Loomis' second trial, defense counsel strenuously objected to the court giving the instruction regarding the effect of deliberately closing one's eyes to criminal activity. (RT 1771-73). The judge refused to say whether he would give the instruction and commented that it would depend on defense counsel's argument. The court agreed to inform the prosecutor before his rebuttal whether the "deliberate avoidance" instruction would be given. (RT 630). Hoping to forestall the instruction, defense counsel attempted to avoid emphasis on lack of awareness by his client and did not mention or discuss the instruction. (ER 9-13) Nevertheless, the court stated it would give the "deliberate avoidance" instruction. Appendix at A2. The prosecutor emphasized this in his rebuttal, (RT 687-690), using physical gestures which "animatedly described to [the jurors] that a defendant is not allowed to put on

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[3]Loomis had been charged and acquitted of possession with intent to distribute this cocaine in her first trial. Nevertheless, the prosecutor introduced this evidence against Loomis in her second trial (Excerpt of Record on Appeal [hereinafter cited as "ER"], at 260). Detective Bentley also identified some several year old gardening magazines and a 1981 phone bill addressed to Loomis, that were found in the trunk of the car but not inside the footlockers. (RT 48-63).

blinders and avoid guilt." (ER 13). Loomis' counsel was not given a meaningful opportunity to discuss the "deliberate avoidance" instruction in closing arguments.[4]

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[4]When the trial court refused to state whether it would give the "deliberate avoidance" instruction, it confronted Petitioner's counsel with an insoluble dilemma. Since he wanted to avoid the instruction at all costs (ER 11), including specifically not calling his client as a witness, counsel made every effort not to invite the instruction during argument, despite his position that the decision to give the instruction should be based only on the evidence. (ER 11-12) If Petitioner's counsel had argued the instruction, the judge and the prosecutor would obviously have said that the instruction should be given and that the prosecutor should have a chance to reply to the argument. (ER 11) If counsel argued the instruction but it was not given, the jury would have heard the instruction anyway and it would have undermined Petitioner's case. (ER 12) If counsel did not argue the instruction as he was forced to do, Petitioner would be prevented from arguing the most important issue in the case. (ER 11)

I.

WHERE THE DISTRICT COURT PERMITS THE PROSECUTION TO DISCUSS AN INSTRUCTION IN ITS CLOSING ARGUMENT WHILE EFFECTIVELY PRECLUDING ANY DEFENSE CLOSING ARGUMENT ON THAT INSTRUCTION, THE PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED AND THOSE RIGHTS COULD NOT BE WAIVED BY THE SILENCE OF PETITIONER'S COUNSEL.

A. Introduction

The procedure by which the district court timed its decision on the deliberate avoidance instruction at Loomis' trial constituted an obvious violation of Rule 30 of the Federal Rules of Criminal Procedure.[5] Rule 30 is a "mandatory rule requiring the trial judge, before closing argument, to inform counsel what action he will take" on the requested instructions. *United States v. Mendoza,* 473 F.2d 697, 700 (9th Cir. 1973). However,

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[5]Rule 30 provides:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the grand jury and, on request of any party, out of the presence of the jury.

the district court's erroneous construction of Rule 30 in this case also resulted in due process violations of the most fundamental nature. Specifically, by delaying its decision on the instruction until after defense closing argument, the district court infringed on Petitioner's due process right to make closing argument on a crucial issue in the case. By making its decision before prosecution closing argument, the district court created a fundamentally unfair situation in which the prosecution was permitted to discuss the deliberate avoidance instruction in its closing argument while the defense was not. This unbalanced treatment of the parties violated Loomis' due process right to a balanced and reciprocal trial procedure in addition to the violation of the due process right to make closing arguments.

Neither Petitioner nor Petitioner's counsel explicitly agreed to waive Petitioner's due process rights. Petitioner's counsel requested prior to argument that the judge rule that the deliberate avoidance instruction not be issued. Each party is entitled under Rule 30 to a ruling prior to argument on which requested instructions are to be given. The court ruled that it would not make a decision until after Petitioner's argument on whether it would issue the deliberate avoidance instruction.[6] Having asserted her rights under Rule 30, Petitioner was not required to object again after the judge ruled. The court's failure to inform Petitioner's counsel prior to argument of its decision to give the deliberate avoidance instruction prejudiced Petitioner by severely inhibiting counsel in his argument and making it impossible for him to argue the case effectively.[7]

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[6]In doing so, the trial court gave no indication to Petitioner of whether it would issue the instruction beyond stating that it would "see what comes out in argument from especially the defendant's side . . . ." (RT 630)

[7]Based upon interviews of members of the jury during Petitioner's

The district court's unfair and unbalanced procedure violated Loomis' due process rights to make closing arguments and to enjoy the same procedural rights as the prosecution. Analyzing this case in its due process aspects, there could be no waiver of the due process based on the silent record in this case. This case does not present a mere technical violation of Rule 30 which might be subject to a less strict waiver standard. Nevertheless, based on the silence of Petitioner's counsel, the Ninth Circuit concluded that the district court "did not violate Rule 30 by delaying the decision to read the [deliberate avoidance] instruction until after defense counsel's argument" Appendix at A13. The Ninth Circuit's construction of Rule 30 is wholly at variance with federal and state caselaw throughout the country which require that all parties be given equal opportunity to discuss critical jury instructions in their closing arguments.

B. The District Court's Procedure Conflicts With Federal and State Cases

Petitioner's counsel is aware of no case construing Rule 30 so as to authorize an unbalanced procedure

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first trial, Petitioner's counsel had concluded that "[n]umerous jurors were confused by the *Jewell* instruction [on deliberate avoidance] and . . . applied it incorrectly." (ER 9) These jurors believed the instruction "required the conviction of Rosemary Loomis of conspiracy and the possession of the cocaine at the apartment if they believed she knew about the conspiracy or the cocaine at the apartment without finding beyond a reasonable doubt that she had the necessary intent . . ." (ER 9-10) In summary, the jurors "believed that closing your eyes within the meaning of the *Jewell* instruction would result in a finding of guilty, regardless of whether Petitioner entered into an agreement or committed acts in furtherance of the illegal conduct." (ER 10) Based on the juror interviews, counsel concluded that if the instruction were given in the second trial, "it was crucial to explain to the jury its significance and its limitations in great detail and argue in length on this subject." (ER 10).

in which the trial judge's decision on jury instructions is timed to permit the prosecution to argue the instruction while effectively precluding the defense from doing so. The courts have long construed Rule 30 in terms of the rule's guarantee of effective closing argument, "The obvious object of the rule in point is to require the judge to inform the trial lawyers in a fair way what the charge is going to be, so that they may intelligently argue the case to the jury." *Ross v. United States,* 180 F.2d 160, 165 (6th Cir. 1950). *Accord, Wright v. United States,* 339 F.2d 578, 580 (9th Cir. 1964). Because failure to give notice of the jury instructions so fundamentally impairs the ability to make an effective argument, the courts have reversed convictions for failure to give such notice before closing arguments.[8]

Even those cases in which reversible Rule 30 error has occurred do not compare with the due process infringement which occurred in the instant case. The district court compounded its impairment of the defense closing argument by adopting an unbalanced procedure under which the prosecution received notice of the

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[8]See *United States v. Harvill,* 501 F.2d 295, 296-7 (9th Cir. 1974) (reversing convictions where effectiveness of counsel's argument was impaired by district court's failure to give defense-requested instructions after defense argued those instructions in reliance on the court's indication that the instructions would be given); *Wright v. United States,* 339 F.2d 578, 580 (9th Cir. 1964) (reversing conviction for failure to comply with Rule 30. The district court failed to give requested instructions but made its decision only after defense counsel based closing argument on the rejected instructions. This affected the defendant's substantial rights in the sense that it impaired the effectiveness of counsel's argument); *Loveless v. United States,* 260 F.2d 487, 488 (D.C. Cir. 1958) (manslaugher conviction reversed where trial court issued manslaughter instruction without informing counsel prior to argument); *Downie v. Powers,* 193 F.2d 760, 766-67 (10th Cir. 1951) (reversing civil judgment where the trial court refused to rule on requests for jury instructions before closing argument).

deliberate avoidance instruction and was able to incorporate and emphasize that instruction in its closing argument. *See* pp. 4-5, *supra*. The prosecutor hit hard at this instruction while Petitioner's counsel did not have any meaningful opportunity to explain the limitations of that instruction to the jury.[9]

C. Due Process Implications of the Instant Rule 30 Violation

The district court's unfair procedure not only violated Rule 30 but implicated due process concerns as well. In the wake of this Court's decision in *Herring v. New York*, 422 U.S. 853 (1975), it is widely acknowledged that "there is a due process right to present closing arguments in criminal cases." *Disciplinary Proceedings of Phelps*, 637 F.2d 171, 176 (10th Cir. 1981). In *Herring*, the Court struck down a statute enabling trial courts to deny defendants the opportunity for a closing argument. This Court held that under both the Sixth and Fourteenth Amendments, "counsel for the defense

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[9]So unprecedented is this unbalanced procedure that its propriety has rarely been discussed. Perhaps the only recent case resembling the instant situation is *State v. Neal*, 529 P.2d 114 (Kan. 1974), in which the defendant, charged with possession of a firearm by a felony, requested an instruction on the meaning of "possession" to enable him to present a theory of his defense in closing argument. The trial court erred in timing the instruction so that it was given after oral argument. In reversing the conviction, the court noted that the erroneous timing not only impaired the defense but placed the defense at a disadvantage in responding to the prosecutor's vigorous closing argument:

> Moreover, defense counsel was deprived of a fair opportunity to discuss his client's theory of the case as measured by the applicable rule of law. We deem the lack of opportunity to be of particular importance in view of the demonstrative nature of the argument made by the state in its final summation.

Id. at 117.

has a right to make a closing summation to the jury, no matter how strong the case for the prosecutor may appear to the presiding judge." *Herring v. New York, supra,* 422 U.S. at 859. This due process right to present a closing argument is violated where, as in the instant case, Rule 30 is misapplied in such a way as to prevent defense counsel from discussing a pivotal jury instruction. *See* notes 8-9, *supra.*

A second due process element in this case arises from the unbalanced nature of a procedure which gave the prosecutor notice of the deliberate avoidance instruction and the ability to emphatically argue that instruction, while denying a similar right to the defense. As this Court noted in *Wardius v. Oregon,* 412 U.S. 470 (1973), due process has impelled the Court to regard with particular suspicion, trial rules "which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." *Id.* at 475 n.6[10]. *Wardius* held that due process was violated where an Oregon notice of alibi statute required a criminal defendant to notify the prosecution of the alibi and supporting facts without giving reciprocal discovery rights to the defendant. The Court noted that due process "does speak to the balance of forces between the accused and his accuser." *Id.* at 475. The instant case presents the spectacle of a prosecutor gaining the nonreciprocal benefit of notice of a pivotal jury instruction and the ability to argue that point with emphasis, all in clear violation of *Wardius.*

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[10]*See, e.g., Washington v. Texas,* 388 U.S. 14, 22 (1967) (condemning state rule which barred a defendant from calling an accomplice to testify on his behalf while permitting the prosection to call the accomplice to testify against the defendant); *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963) (requiring appointed counsel to balance state's representation by prosecuting attorneys).

D. Waiver of Constitutional Rights

Inasmuch as the district court's nonreciprocal procedure constituted a violation of fundamental due process rights, the Ninth Circuit should not have relied on the silence of Petitioner's counsel as an acquiescence to this procedure. Appendix at A12. Assuming *arguendo* that a more technical Rule 30 violation could be waived under the circumstances of this case, the standard for a waiver of such a violation is less strict than the standard for waiver of a constitutional right. *Jordan v. Weaver,* 472 F.2d 985, 990 (7th Cir.), *rev'd on other grounds,* 415 U.S. 651 (1973). This Court has always set a high standard of proof for the waiver of constitutional rights. *Miranda v. Arizona,* 384 U.S. 436, 475 (1966). Every reasonable presumption must be adopted against waiver of fundamental constitutional rights. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

Analyzing the district court's procedure as a due process violation, the silence of Petitioner's counsel cannot form the basis for a waiver of Petitioner's fundamental due process rights. Courts must carefully scrutinize waivers of constitutional rights even where the defendants are represented by counsel. *United States v. Christian,* 571 F.2d 64, 68-69 (5th Cir. 1979). The higher standard for waiver of constitutional rights could not be satisfied by the silence of Petitioner's counsel but required an explicit waiver by the Petitioner herself. *United States v. McIntyre,* 467 F.2d 274, 276 n.1 (8th Cir. 1972).[11]

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[11]In response to this higher waiver standard, the courts have required a personal waiver of constitutional rights by the defendant rather than defense counsel. *See, e.g., United States v. Garcia,* 517 F.2d 272, 276-78 (5th Cir. 1975) (requiring personal waiver of attorney's conflict of interest); *Cross v. United States,* 325 F.2d

In factual circumstances similar to the instant case, this Court has held that due process rights cannot be waived by the failure of the defendant or his counsel to object. In *Webb v. Texas*, 409 U.S. 95, 98 (1972), this Court held that the trial judge violated due process by singling out a defense witness for a lengthy admonition on the dangers of perjury. In rejecting a waiver argument, this Court noted: "The suggestion that the petitioner or his counsel should have interrupted the judge in the middle of his remarks to object is, on this record, not a basis to ground a waiver of the petitioner's rights." *Id.*

The Ninth Circuit did not have an opportunity to assess the instant case under the stricter waiver standard applicable to constitutional violations. Applying that stricter standard would have required more careful scrutiny of waiver than a simplistic reliance on the silence of Petitioner's counsel.

II.

WHERE PETITIONER DID NOT TESTIFY AND THERE WAS NO EVIDENCE THAT PETITIONER DELIBERATELY AVOIDED KNOWING OF ILLEGAL ACTIVITY, THE NINTH CIRCUIT'S APPROVAL OF AN INSTRUCTION ON "DELIBERATE AVOIDANCE" CONFLICTS WITH FEDERAL CASES IN OTHER CIRCUITS AND CASES WITHIN THE NINTH CIRCUIT.

Beginning with English commonlaw, it has been a firmly established premise of English and American jurisprudence that any statutory requirement of actual knowledge is subject to a "strictly limited exception"

629, 631 (D.C. Cir. 1963) (requiring personal waiver of defendant's right to be present at the trial).

for deliberate avoidance. G. Williams, *CRIMINAL LAW: THE GENERAL PART* 157 (2d ed. 1961). The rule of deliberate avoidance is "that a person who deliberately shuts his eyes to an obvious means of knowledge has sufficient *mens rea* for an offense based on such words as . . . 'knowingly' ": *Edwards, The Criminal Degrees of Knowledge,* 17 Modern L.Rev. 294, 298 (1954).

As interpreted by all federal courts, both the letter and spirit of the "strictly limited" deliberate avoidance exception demand that any instruction on that point be given only in situations where the defendant deliberately shuts his or her eyes to illegal activity. The courts have emphasized that "[o]nly a finding of *conscious purpose* to avoid enlightenment will justify charging the defendant with knowledge." *United States v. General Motors Corp.,* 226 F.2d 745, 749 (3d Cir. 1955) (emphasis in original).[12] So limited, the deliberate avoidance rule is not appropriate merely because the defense is ignorance and there is circumstantial evidence that the defendant shou'd have known of the facts. The deliberate avoidance instruction "should be given only if there is evidence that the defendant tried to close his eyes or ears to what was happening." *United States v. Beckett,* 724 F.2d 855, 856 (9th Cir. 1984).[13] Where "the

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[12]*See, e.g., United States v. Squires,* 440 F.2d 859, 864 & n.12 (2d Cir. 1971) (reversing conviction where jury instruction on "knowingly" omitted requirement of "conscious avoidance"); *Griego v. United States,* 298 F.2d 845, 849 (10th Cir. 1962) (reversing conviction where defendant's theory of the case was lack of knowledge and the trial court omitted an instruction on deliberate avoidance. The court noted: "The test is whether there was a conscious purpose to avoid enlightenment.").

[13]*See, e.g., United States v. Garzon,* 688 F.2d 607, 609 (9th Cir. 1982) (reversing conviction where the defendant was present at a cocaine transaction between his father and a DEA agent during which the defendant carried a package across the room and showed the contents to the agent. The defendant was later arrested with

only evidence on intent also tend[s] to establish actual knowledge," the deliberate avoidance instruction is unwarranted. *Id.*[14]

The Ninth Circuit decision in this case violated both the letter and spirit of the deliberate avoidance instruction by approving that instruction in the absence of any evidence that Petitioner deliberately closed her eyes to illegal activity. The court found that the deliberate avoidance instruction was warranted where there was testimony that Petitioner was aware of her boyfriend's involvement in drug dealing, Appendix at A11-12, where part of her case to avoid conspiratorial liability was to claim ignorance, *id.*, where the defense presented questions in cross-examination of witnesses in an effort to prove lack of knowledge, *id.*, where the defense "suggested" that Petitioner's boyfriend was engaged in illegal conduct without informing Petitioner, *id.*, where there was substantial evidence that Petitioner should have known of the drug dealing, *id.* at A12, and where the defense argued that 'mere presence' at the situs of a conspiracy is not enough to show participation in the conspiracy, *id.*

Beginning at commonlaw and continuing up to the present time, the courts have conditioned the giving of

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cash in his pocket. The court found that the deliberate avoidance instruction should not have been given and reversed the conviction because "there must be evidence 'that the defendant purposely contrived to avoid learning all of the facts in order to have a defense in the event of being arrested and charged.' ")

[14]*See, e.g., United States v. Pacific Hide & Fur Depot, Inc.*, 768 F.2d 1096, 1099 (9th Cir. 1985) (reversing conviction where the defendant instructed his employee to bury capacitors containing a toxic substance. In condemning the giving of an instruction on deliberate avoidance, the court noted "this evidence, to the extent relevant, points to actual knowledge, rather than deliberate avoidance. It does not support the giving of a [deliberate avoidance] instruction.")

a deliberate avoidance instruction on the existence of "evidence" of conscious avoidance. The so-called "evidence indicating conscious avoidance" referred to in the Ninth Ci[illegible]inion is not that, but is merely circumstantial [illegible]ance raising an inference that Petitioner possessed positive knowledge. The court could cite no evidence that Petitioner "deliberately" or "consciously" avoided knowledge of the drug conspiracy. The deliberate avoidance doctrine is rendered meaningless by the Ninth Circuit decision which effectively deletes the word "deliberate" from deliberate avoidance.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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ROSEMARY LOOMIS

APPENDIX

APPENDIX

UNITED STATES CONSTITUTION

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger: nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULES OF CRIMINAL PROCEDURE

RULE 30

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the grand jury and, on request of any party, out of the presence of the jury.

TRIAL COURT'S INSTRUCTION ON DELIBERATE AVOIDANCE

AS TO THE DEFENDANT ROSEMARY LOOMIS THE ELEMENT OF KNOWLEDGE MAY ALSO BE SATISFIED BY INFERENCE DRAWN FROM PROOF THAT SHE DELIBERATELY CLOSED HER EYES TO WHAT OTHERWISE WOULD HAVE BEEN OBVIOUS TO HER. A FINDING BEYOND A REASONABLE DOUBT OF A CONSCIOUS PURPOSE TO AVOID ENLIGHTENMENT WOULD PERMIT AN INFERENCE OF KNOWLEDGE. STATED ANOTHER WAY, A DEFENDANT'S KNOWLEDGE OF A FACT MAY BE INFERRED FROM DELIBERATE AVOIDANCE OF THE EXISTENCE OF THE FACT. DELIBERATE AVOIDANCE OF KNOWLEDGE IS THE EQUIVALENT OF ACTUAL KNOWLEDGE IF YOU FIND BEYOND A REASONABLE DOUBT THAT THERE WAS A HIGH PROBABILITY THAT DEFENDANT LOOMIS WAS AWARE OF THE COCAINE DISTRIBUTION SCHEME ALLEGED IN THE INDICTMENT.

IT IS ENTIRELY UP TO YOU AS TO WHETHER YOU FIND ANY DELIBERATE CLOSING OF THE EYES, AND THE INFERENCES TO BE DRAWN FROM ANY SUCH EVIDENCE. A SHOWING OF NEGLIGENCE OR MISTAKE ALONE IS NOT SUFFICIENT TO SUPPORT A FINDING OF WILFULNESS OR KNOWLEDGE. IF YOU FIND THAT DEFENDANT LOOMIS DID NOT KNOWINGLY AND WILFULLY JOIN THE CONSPIRACY ALLEGED IN COUNT 1, THEN YOU MUST ACQUIT HER.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG - 9 1985

PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JON WAYNE VERMOUTH Defendant-Appellant.	No. 84-5111 D.C. No. CR 83-731-DWW
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROSEMARY LOOMIS, Defendant-Appellant.	No. 84-5167 D.C. No. CR 83-731-DWW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Honorable David W. Williams, District Judge, Presiding
Argued and submitted July 8, 1985 -
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 21.

Before: ANDERSON and TANG, Circuit Judges, and SOLOMON** District Judge.

Jon Vermouth and Rosemary Loomis appeal their convictions for various narcotics violations. Vermouth raises several challenges to the search of his storage locker, a Santa Barbara residence and Oregon cocaine lab. Loomis raises several challenges to the jury instructions and a variety of other challenges. The two were first tried together on a ten count indictment with Loomis named in three of the ten charges. Vermouth was convicted on eight of the ten counts, but Loomis was acquitted on one count and granted a mistrial on the other two counts charged against her. On retrial of the two counts, she was convicted on both. We affirm the convictions against both defendants.

I.

USA v. Jon Vermouth, No. 84-5111

The government argues that Vermouth lacked a legitimate expectation of privacy in locker 285 at the Storage Place and thus may not challenge the search of the locker on fourth amendment grounds. *Rakas v. Illinois,* 439 U.S. 129 (1978). Under *United States v. McConney,* 728 F.2d 1195, 1203 (9th Cir.), *cert. denied,* 105 S.Ct. 101 (1984), the district court's determination of this issue is reviewed *de novo.*

We conclude that the appellant's expectation of privacy in the locker itself is a legitimate one. Although the appellant used the locker with the apparent knowledge that the owner retained access to it, such knowledge does not necessarily lead to the conclusion

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** Honorable Gus J. Solomon, Senior U.S. District Judge for the District of Oregon, sitting by designation.

that the appellant was leaving the locker exposed to the public or to governmental intrusion. *Katz v. United States*, 389 U.S. 347, 351 (1967)("what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.") By leasing the locker space under the terms of the agreement, the appellant maintained general control or supervision over how the space was to be used. Arrangements indicating joint control and supervision of the place searched may be sufficient to confer a reasonable expectation of privacy. *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984).

The expectation of privacy in the vehicle trunk and footlocker within it appears even more reasonable. Vermouth did not give the owner of the Storage Place the keys to the closed containers inside the locker. Consequently, he was able to exclude all others from access to these containers in the absence of a warrant. *See United States v. Portillo*, 633 F.2d 1313, 1317 (9th Cir. 1980), *cert. denied*, 450 U.S. 1043 (1981). He had a right to challenge the search on fourth amendment grounds.

Vermouth contends that the district court erred by refusing him an evidentiary hearing (a *Franks* hearing) to explore his claim that the warrant affidavit contained intentional or reckless omissions. He argues that he made a sufficient offer of proof to trigger the necessity for such a hearing. The government argues that the offer of proof was insufficient. The standard of review is *de novo*. *United States v. Ritter*, 752 F.2d 435, 439 (9th Cir. 1985).

Under *Franks v. Delaware*, 438 U.S. 154 (1978), a defendant is entitled to a hearing to challenge the truthfulness of statements in a warrant affidavit under

certain circumstances. Bare allegations of bad faith are not sufficient to trigger this right to a hearing. *United States v. Chesher*, 678 F.2d 1353, 1360 (9th Cir. 1983). A two-part test must be satisfied to require a hearing. First, the defendant must make a "substantial preliminary showing" that the affidavit contained falsehoods that were intentional or reckless. Second, the alleged misstatements must be essential to the finding of probable cause. *Chesher*, 678 F.2d at 1360-62.

Vermouth's offer of proof focuses on omissions in the affidavit regarding the reliability of the dog searches which preceded the search of the locker. The defendant argues that declarations from the managers of the Storage Place suggested that one of the DEA agents questioned the dogs' reliability in windy conditions; that declarations by dog experts explained that windy conditions and fatigue can diminish the dogs' reliability; that the dogs allegedly failed to detect a bait bag of marijuana in locker 200 and finally, the affidavit failed to indicate that the dogs only had reliability rates of 38% and 68% in certain prior performance tests.

This offer of proof is insufficient to mandate a *Franks* hearing. The government offered counter-declarations of dog experts to show that the dogs had been extensively trained, had performed well in annual evaluations and monthly performance tests, and had the capacity to perform well in the weather conditions alleged to have existed the day the dogs were used. Moreover, the warrant to search was limited to lockers at which the detection dogs had both alerted. Overall, the defendant has not made a substantial showing that the alleged omissions in the warrant affidavit were intentional or reckless efforts to exaggerate the government's asserted basis for probable cause. The district court did not err in denying the appellant a *Franks* hearing.

The appellant next contends that a field test should have been held to determine the dogs' reliability. A district court's decision to admit or exclude evidence will be upheld unless it constitutes an abuse of discretion. *United States v. Merrill,* 746 F.2d 458, 465 (9th Cir. 1984).

Both sides furnished declarations regarding the dogs' reliability. There was enough evidence before the court to determine whether reliance on the dogs was reasonable. In addition, a field test would have been elaborate and time consuming. The district court did not abuse its discretion.

The appellant next raises two challenges to the search of the Santa Barbara residence at 822 Voluntario. First, he argues that misstatements in the warrant affidavit required a *Franks* hearing. Second, he contends that the search warrant was not supported by probable cause.

On the *Franks* issue, Vermouth claims specifically that the affidavit failed to indicate that the Voluntario address on the rental agreement for locker 285 had been deleted in a rental renewal agreement. The district court, however, did not err by refusing to hold a formal hearing. The alleged omissions do not constitute a substantial preliminary showing of reckless falsity sufficient to require a *Franks* hearing. Nor are they essential to a finding of probable cause because the authorities had reasons to link Vermouth to the residence independent of the locker registration card.

Additionally, the evidence relied upon to show probable cause is sufficient to indicate in "a practical, commonsense" manner that there was "a fair probability" that contraband or other evidence of a crime would be found at the Voluntario residence. *Illinois v. Gates,* 462 U.S. 213, 238 (1983). Under *de novo* review,

McConney, 728 F.2d at 1203, the district court did not err in concluding that probable cause existed to justify a warrant to search the residence.

Vermouth next challenges the district court's admission of evidence seized from the residence at 520 Brimstone Gulch Road in Wolfcreek, Oregon based on the conclusion that Vermouth lacked a legitimate privacy expectation in the Oregon residence. He also contends that the court erred in its additional conclusion that an insufficient preliminary showing was made to require a *Franks* hearing to determine whether intentional or reckless falsehoods were included in the warrant affidavit.

The district court relied on the absence of a proprietary interest in the Oregon residence. This court, however, has looked beyond indications of ownership and possession to address the standing issue. *United States v. Nadler*, 698 F.2d at 999. Other factors relevant to this inquiry are whether the defendant had the power to exclude others. *Id.* at 999, whether he has stored belongings in the premises searched, *United States v. Salvador*, 740 F.2d 752, 755 n.2 (9th Cir. 1984), and whether he stayed overnight on the premises. *Id.* In addition, a co-conspirator with joint control over the premises searched may have a reasonable expectation of privacy in the area. *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984).

Here, the defendant possessed a key to the premises and claims to have stored belongings there. As a cocaine lab was discovered at the residence, one can reasonably conclude that those individuals with keys to the house sought to limit entry to people involved in the operation.

The government relies on Vermouth's arrest a week before the search of the Oregon residence to show that

he had abandoned the Oregon residence. Although abandonment can divest an individual of a fourth amendment interest in the abandoned property, *United States v. Burnette*, 698 F.2d 1083, 1047 (9th Cir. 1983), *cert. denied*, 103 S.Ct. 2106 (1983), abandonment must be voluntary. *Id.* (citing *United States v. Kendall*, 655 F.2d 199, 200 (9th Cir.), *cert. denied*, 455 U.S. 941 (1981). The government cannot use Vermouth's arrest to prove voluntary abandonment. We find that Vermouth had a legitimate expectation of privacy in the Oregon residence.

We conclude that the district court did not err by denying a *Franks* hearing. The declaration of the officer reaffirmed that he had smelled what he thought was P2P, brought out a chemist for an expert opinion (unsuccessfully due to windy conditions), and possessed no reason to lie because at the time the warrant was sought, he knew that the defendants had been arrested on cocaine charges rather than amphetamine charges in California. Moreover, the affidavit stated that surveillance had spotted Vermouth at the residence which may have provided a basis for probable cause independent of the officer's detection of the odor.

Vermouth next claims that the court's admonition to the lawyers outside the presence of the jury that they were not to suggest that a unanimous verdict was unnecessary constituted an undue restriction on the defense lawyer's closing argument. Additionally, Vermouth challenges the court's instruction which allegedly coerced a unanimous guilty verdict. The standard of review is abuse of discretion. *United States v. McDonald*, 576 F.2d 1350, 1358 (9th Cir.), *cert. denied*, 439 U.S. 830 & 927 (1978).

We find that the court's conduct did not amount to an abuse of discretion. The comments did not exceed

"the permissible encouragement of the jurors to pursue their deliberations toward a verdict, if possible, in order to avoid the expense and delay of a new trial. The jury was neither coerced nor directed toward any verdict." *United States v. Rodriguez*, 545 F.2d 829, 832 (2d Cir. 1976), *cert. denied*, 434 U.S. 819 (1977) (supplemental instruction to jury that it had duty to find facts based only on evidence presented not error). See also *United States v. Bermudez*, 526 F.2d 89 (2d Cir. 1975).

Finally, Vermouth raises a challenge under Fed. R. Crim P. 32(c)(3)(D). He challenges alleged inaccuracies in the presentence report regarding the amount of cocaine that had been seized from him and information concerning a state drug conviction.

The trial court did not err because it was not required to apply Rule 32(c)(3)(D) in this situation. The rule requires the court to make the presentence report available to the defendant and counsel before sentencing. 32(c)(3)(A). That requirement was met. The requirements of 32(c)(3)(D) contemplate challenges *prior* to sentencing. See Advisory Committee Notes. ("[Rule 32(c)(3)(D)] requires the sentencing court, as to each matter controverted, either to make a finding as to the accuracy of the challenged factual proposition or to determine that no reliance *will be* placed on that proposition at the time of sentencing.") (emphasis added). The challenges raised here, however, were made *after* sentencing had occurred on April 9.

Vermouth's conviction is AFFIRMED.

II.

United States v. Rosemary Loomis, No. 84-5167

Loomis first argues that there was an insufficient basis for the trial court's giving of the *Jewell* instruction. She contends there was no testimony to indicate that she had any awareness of Vermouth's involvement in drug dealing.

The *Jewell* instruction is proper "only when a defendant claims a lack of guilty knowledge and there are facts in evidence that support an inference of deliberate ignorance." *United States v. McAllister*, 747 F.2d 1273, 1275 (9th Cir. 1984)(citing *United States v. Henderson*, 721 F.2d 276, 277 (9th Cir. 1983). *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir.)(en banc), *cert. denied*, 426 U.S. 951 (1976)("[D]eliberate ignorance and positive knowledge are equally culpable."). The instruction, however, should not be given merely because the defendant claims a lack of knowledge. *United States v. Garzon*, 688 F.2d 607, 709 (9th Cir. 1982). There must be facts indicating deliberate ignorance. *Id.* "[T]he cases in which the facts point to deliberate ignorance are comparatively rare, and they must be carefully distinguished from instances where the defendant was merely negligent." *McAllister*, 747 F.2d at 1275 (citing *United States v. Murrieta-Bejarano*, 552 F.2d 1323, 1325 (9th Cir. 1977)).

The only basis Loomis asserts for the impropriety of the *Jewell* instruction is that she never took the stand to testify as to a lack of knowledge about her boyfriend Vermouth's involvement with drugs. However, part of the defendant's case to avoid conspiratorial liability was to claim ignorance. The defense presented questions in cross-examination of witnesses in an effort to prove lack of knowledge. In argument, the defense suggested that

Vermouth was engaged in illegal conduct without informing Loomis of his dealings. Thus, the issue of conspiratorial knowledge was relevant.

As to evidence indicating conscious avoidance, the government produced evidence of cocaine bags on a kitchen countertop and a package of cocaine ready to be sent to an address found in Loomis' address book. The apartment contained several elaborate counter-surveillance devices, including a telephone scrambler and an electronic bug detector. Bundles of cash and evidence of other assets suggested personal wealth far in excess of the defendants' income. The evidence was sufficient to support an inference of deliberate ignorance of Vermouth's activities on the part of Loomis.

Loomis further contends, however, that the district court violated Fed.R.Crim.P. 30 by delaying the decision to give the instruction until after closing argument. She argues that this prejudiced her because her counsel did not have the opportunity to discuss *Jewell* concepts during closing argument.

Rule 30 requires the district court to "inform counsel of its proposed action upon the requests [for jury instructions] prior to their arguments to the jury." Here, the trial court explained to both lawyers its "proposed action upon the requests" with respect to the *Jewell* instruction. There was no objection to the employment of this procedure. *United States v. Abushi,* 682 F.2d 1289, 1303 (9th Cir. 1982). In argument, defense counsel elected to argue both that Loomis had no knowledge of her boyfriend's criminal activities and that even if she did, she did not join the conspiracy to distribute cocaine. He further argued that "mere presence" where the conspiracy was allegedly taking place is not enough to show participation in the conspiracy. Based upon this

argument, the trial court elected to give the *Jewell* instruction pursuant to its "proposed action" explained prior to argument. It did not violate Rule 30 by delaying the decision to read the *Jewell* instruction until after defense counsel's argument.

Defense counsel requested a lesser included charge of simple possession on the second count of the indictment which charged Loomis with possession with intent to distribute five and one-half pounds of cocaine. A defendant is entitled to a lesser included offense instruction if: (1) a lesser included offense is identified within the charged offense, and (2) a rational jury could find the defendant guilty of the lesser offense but not the greater one. *United States v. Johnson,* 637 F.2d 1224, 1233-34 (9th Cir. 1980).

Loomis claims that the jury could have concluded that the bulk of the cocaine found in the metal suitcase belonged to Vermouth while her possessory interest was limited to the cocaine found around the apartment. However, even limiting the amount supporting the charge in the second count of the indictment to the 37 grams of 90% pure cocaine found outside of the suitcase, it does not appear that a rational jury could find such possession was for personal use instead of distribution. See *United States v. Muniz,* 684 F.2d 634, 636 (9th Cir. 1982); *United States v. Johnson,* 734 F.2d 503, 506 (10th Cir. 1984)(possession of 26.6 grams of 82 percent pure cocaine could not rationally be limited to personal use). It was not error to refuse the lesser included instruction.

Loomis further contends that the district court committed plain error by failing to limit count two of the indictment to the cocaine found in the metal suitcase thereby excluding the cocaine found in the kitchen for consideration of the charge. However, such an

instruction was never requested and this court will not generally reverse a district court's failure to give a *sua sponte* limiting instruction. *United States v. Palmer,* 691 F.2d 921, 923 (9th Cir. 1982).

Loomis next contends that the district court erred when it inadvertently misstated a jury instruction by omitting a word during instruction on the conspiracy count. Despite ample opportunity to object to the proposed wording of the instructions, no such objection was registered. The test is for plain error.

This court cannot lightly reverse a conviction under the plain error standard. Plain errors must be "particularly egregious errors" which "seriously affect the fairness, integrity or public reputation of judicial proceedings," and we will reverse only to prevent "a miscarriage of justice." *United States v. Young,* 105 S.Ct. 1038, 1046-47 (1985) (citations omitted).

The adequacy of the instructions is determined by examining the instructions as a whole. *United States v. Green,* 745 F.2d 1205, 1209 (9th Cir. 1984). The instructions must adequately inform the jury, *United States v. Harris,* 738 F.2d 1068, 1072 (9th Cir. 1984), and a trial judge has great latitude in crafting the instructions so long as they fairly and adequately cover the issues presented. *United States v. Marabelles,* 724 F.2d 1374, 1383 (9th Cir. 1984).

The instructions in their entirety dispelled any confusion which may have been created by the giving of the flawed instruction. After the flawed instruction, the court continued to emphasize that the alleged conspirator must act "with the intent to advance or further some object or purpose of the conspiracy" and "with understanding of the unlawful character of a plan" and must have "the purpose of furthering the under-

taking or scheme." The omitted word in part of the instructions was not plain error.

Loomis argues that there was little evidence to show active or direct participation in the conspiracy. Thus, she contends that the *Pinkerton* charge was plain error. *Pinkerton v. United States,* 328 U.S. 640, 648 (1946).

The district court did not commit plain error by giving the instruction. Loomis' apartment on Voluntario Street contained counter-surveillance devices, baggies of cocaine in large quantities and tax and financial records suggesting efforts to hide sources of major income. The government is not required to prove a direct agreement between alleged conspirators. *Abushi,* 682 F.2d at 1293. An agreement can be inferred from the acts of the parties. *Id.* Once the existence of a conspiracy is established, only a slight connection to the conspiracy is needed. *Id.* The evidence in this case was sufficient to justify the *Pinkerton* instruction.

Loomis next argues that her acquittal in the first trial on charges of possession with intent to distribute cocaine found in Locker 285 precludes the government from introducing evidence of the cocaine in Locker 285 in her second trial. In this case, Loomis' counsel expressly stated that he had no objection to the introduction of evidence relating to items found in Locker 285, including the footlockers in which 50 pounds of cocaine was found. The test is for plain error.

Here, the use of evidence from locker 285 does not constitute plain error. The government did not seek to prove Loomis' possession of the cocaine found in that locker. Rather, the admission of the cocaine was sought to show acts of conspiratorial involvement by alleged co-conspirator Jon Vermouth. "The law is clear that a defendant may be convicted of the substantive acts

of his coconspirators, as long as those acts are 'committed pursuant to and in furtherance of the conspiracy.' " *United States v. Reed*, 726 F.2d 570, 580 (9th Cir. 1984)(quoting *United States v. Beecroft*, 608 F.2d 753, 757 (9th Cir. 1979)). That Loomis may have participated in a conspiracy to help Vermouth distribute the 50 pounds of cocaine involved a separate issue outside the collateral estoppel bar.

Loomis next argues the district court abused its discretion by imposing sentence based partially on the court's alleged consideration of Loomis' insistence on trial despite the strength of the government's case against her. She argues this penalized her exercise of the right to trial.

The punishment imposed was three years and a $20,000 fine. The potential punishment was 30 years and $50,000. The district court has wide discretion in determining what sentence to impose and if the sentence is within statutory limits, the sentence is not generally subject to review. *United States v. Lopez-Gonzales*, 688 F.2d 1275, 1276 (9th Cir. 1982). However, discretion must be exercised, considering circumstances of the crime, mitigating and aggravating circumstances and an accurate evaluation of the particular offender. *Id.* at 1277.

Here, the district court expressly disclaimed any consideration of Loomis' exercise of the right to her second trial in determining sentence. Additionally, the sentence was well within the trial court's discretion.

Loomis next raises several claims of prosecutorial misconduct: an allegedly improper reference to the failure of two witnesses to testify, allegedly misleading testimony of a tax expert called by the government, and asserted misstatements during the government's closing

argument. The claim of misconduct with respect to the allegedly improper reference to a witness' failure to testify does not justify reversal. It is well established that "[a] prosecutor may properly comment upon a defendant's failure to present witnesses so long as it is not phrased as to call attention to defendant's own failure to testify." *United States v. Fleishman,* 684 F.2d 1329, 1343 (9th Cir.), *cert. denied,* 459 U.S. 1044 (1982). The other claimed errors, in the context of the entire record and trial, *Young,* 105 S.Ct. at 1045-47, do not amount to plain error.

Loomis next argues there was no evidence linking her to five and one-half pounds of cocaine. We find that sufficient evidence existed for the conviction for possession with intent to distribute the five and one-half pounds of cocaine in the metal suitcase. The essential basis on which Loomis argues no relationship to the suitcase is a lack of ownership. However, the involvement with Vermouth, the presence of the suitcase containing cocaine in the livingroom, the bundles of cash stashed through the apartment and the baggies of cocaine lying around the kitchen provide ample evidence of possession. Drawing evidentiary inferences in a light most favorable to the government, a rational jury could find beyond a reasonable doubt that Loomis possessed the cocaine found in the suitcase. *United States v. Ramirez,* 710 F.2d 535, 548-49 (9th Cir. 1983).

Loomis next contends that there was no necessity for an expert witness and thus no foundation for admitting the testimony of the government's expert to show Loomis was concealing sources of income in preparing her tax return.

This argument is meritless. Expert testimony is admissible if the jury may receive "appreciable help from

it." *United States v. Solomon*, 753 F.2d 1522, 1525 (9th Cir. 1985). The decision to admit such testimony rests with the broad discretion of the trial judge and should not be disturbed unless manifestly erroneous. *Fleishman*, 684 F.2d at 1335. Here, the relationship between certain omissions or statements on a return and an effort to conceal sources of income is not necessarily an area in which expert testimony would not be helpful. There was no abuse of discretion.

Loomis next contends that the owner could not consent to the manner in which the government used detection dogs to examine the lockers at the Storage Place, eventually leading to a search of locker 285. Her argument is essentially that the scope of the owner's consent to search the Storage Place was exceeded. Lommis, however, has no standing to assert the fourth amendment rights of the owner.

With respect to locker 285 itself, Loomis alleges no facts to indicate that she maintained a reasonable expectation of privacy in that locker. Even if she did, the use of dogs to sniff the lockers was not a "search" triggering fourth amendment protection. *United States v. Place*, 103 S. Ct. 2637 (1983); *Unitd States v. Beale*, 736 F.2d 1289 (9th Cir. 1984) (en banc). Loomis argues that *Place* and *Beale* address dog sniffing in public areas like airports and should not be extended to cover less public areas like the Storage Place. This is a distinction without significance, however, because the focus of the privacy inquiry is on the specific area sought to be retained as private and the degree of intrusiveness into that allegedly protected area. *Place*, 103 S. Ct. at 2644 (privacy interest in luggage).

Loomis also challenges the district court's refusal to allow discovery of the training manual for detection

dogs. Without it, she argues, the *Franks* challenge to the dogs' reliabiity was impaired.

The district court has wide discretion in ruling on discovery requests in criminal cases. *United States v. Maynard,* 458 F.2d 247, 248 (9th Cir. 1973); *United States v. Watson,* 669 F.2d 1374, 1384 (11th Cir. 1982). In this case, the trial court had evidence of the dogs' performance on tests and declarations from experts on canine behavior when determining the propriety of a *Franks* hearing. It is questionable whether the Customs manual on detection dog training would have added much to the defendant's case for a *Franks* hearing.

In addition, Loomis still must demonstrate a reasonable expectation of privacy in locker 285 to make any challenges with respect to the *Franks* issue. United States v. Pollock, 726 F.2d 1456, 1465 (9th Cir. 1984). The *Franks* right to an evidentiary hearing to challenge a warrant affidavit stems from the fourth amendment right to challenge unreasonable searches. Absent some demonstration of a protectible interest, Loomis has no standing to raise this challenge to the district court's denial of the discovery request.

Loomis finally argues that the California Constitution was violated when authorities obtained her address through her unlisted phone number from the phone company without a warrant. *People v. Chapman,* 36 Cal.3d 98 (1984). However, the California Supreme Court has held recently that the California constitution authorizes suppression no more than the federal constitution due to the State's passage of Proposition 8. *In re Lance W.,* ___ Cal.3d ___, 210 Cal.Rptr. 631, 646 (1985) ("[A] defendant may seek suppression of evidence obtained in a search or seizure that violates 'state constitutional standards,' [but] a court may exclude

the evidence on that basis only if exclusion is also mandated by the federal exclusionary rule applicable to evidence seized in violation of the Fourth Amendment."). Absent a fourth amendment challenge to the invasion of some reasonable privacy interest, the appellant has no claim for suppression of address information obtained from the phone company.

Loomis' conviction is AFFIRMED.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on December 4, 1985, I served the within ***Petition for Writ of Certiorari*** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
(Original and forty copies)

Brian Sun
U.S. Department of Justice
Central District
312 North Spring Street
Los Angeles, California 90012

Solicitor General
Department of Justice
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 4, 1985, at Los Angeles, California.

Joy Rivelli Miller
(Original signed)

Supreme Court, U.S.
FILED
FEB 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-965 and 85-966

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROSEMARY LOOMIS, PETITIONER

v.

UNITED STATES OF AMERICA

JON VERMOUTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
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QUESTIONS PRESENTED

1. Whether a dog sniff of petitioner Vermouth's rental storage locker violated petitioners' Fourth Amendment rights (both petitioners).

2. Whether the district court improperly failed to conduct an evidentiary hearing on petitioners' claim that a search warrant application contained material misstatements and omissions (both petitioners).

3. Whether the district court violated the requirements of Fed. R. Crim. P. 30 by delaying a final decision upon whether to give a jury instruction concerning deliberate ignorance until after defense counsel's closing argument (petitioner Loomis only).

4. Whether, under the facts of this case, the district court properly gave an instruction that conscious avoidance of the truth can constitute proof of the element of guilty knowledge (petitioner Loomis only).

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-965

ROSEMARY LOOMIS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-966

JON VERMOUTH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A20) is unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1985. Petitions for rehearing were denied on October 22, 1985. The petitions for a writ of certiorari were filed on December 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]"Pet. App." refers to the appendix to the petition filed in No. 85-965.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner Vermouth was convicted on one count of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; two counts of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); one count of using a telephone to facilitate the commission of a felony, in violation of 21 U.S.C. 843; and four counts of interstate travel to facilitate narcotics trafficking, in violation of 18 U.S.C. 1952.[2] He was sentenced to concurrent terms of 12 years' imprisonment on the conspiracy and possession counts, four years' imprisonment on the telephone facilitation count, and five years' imprisonment on the interstate travel counts. He also was sentenced to a three-year special parole term and ordered to pay a total of $50,000 in fines.

Following a jury retrial[3] in the same district, petitioner Loomis was convicted of conspiracy to possess with intent to distribute cocaine, in violation of 21 U.S.C. 846, and of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841 (a)(1). She was sentenced to concurrent three-year terms of imprisonment and ordered to pay a $20,000 fine. The court of appeals affirmed both convictions.

1. During early 1983, Santa Barbara County, California, police conducting an investigation of burglaries of several storage warehouse facilities concluded that the burglars

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[2]The district court dismissed one possession count, and the jury was unable to reach a verdict on one count alleging the conduct of a continuing criminal enterprise.

[3]Petitioner Loomis was initially tried jointly with petitioner Vermouth and acquitted on one cocaine possession count. The jury in that case, however, was unable to reach a verdict on the conspiracy count and on another possession count.

were likely seeking to obtain narcotics stored at the facilities. To further their investigation, the officers obtained permission from the proprietor of one of the facilities to run narcotics detecting dogs through the warehouse. Petitioner Vermouth had rented storage locker No. 285 in the facility. Pursuant to the rental contract, Vermouth had agreed not to store contraband on the premises and to permit the owner of the warehouse, who retained pass keys for all units, to remove such items (E.R. 21-24).[4]

On April 12, 1983, investigators arrived at the facility with two narcotics detection dogs, "Ali" and "Dutch." After both dogs were given a "warm-up" exercise requiring them to find a bag of marijuana that the officers had hidden, each was separately walked through the locker area. The dogs alerted to a total of nine lockers. Both alerted to the same five lockers, one of which was locker No. 285. E.R. 29-31. The officers then applied for warrants authorizing searches of the lockers to which both dogs had alerted. The search warrant application for Vermouth's locker related how both dogs had alerted to it independently, as well as the dogs' qualifications and training in locating drugs. In particular, the application averred that Dutch had been used on numerous occasions to locate contraband and that the validity of the animal's alerts had been accepted by numerous state and federal courts. As to Ali, the application averred that, in prior cases, no narcotics were found when the dog did not alert, but that "in the cases he did alert, there were narcotics found" (E.R. 174).

After receiving a warrant from a local judge, a search of locker No. 285 revealed the presence of two footlockers containing approximately 50 pounds of high quality cocaine, bags containing cocaine residue, testing devices for

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[4] "E.R." and "Supp. E.R." refer to the excerpt of record and supplemental excerpt of record in the court of appeals in the *Vermouth* case.

cocaine, and paperwork bearing the names of both petitioners (E.R. 35). Evidence found in the locker, as well as other evidence the officers gathered, led the officers to believe that still more evidence of drug trafficking could be obtained at 822 North Voluntario Street, Santa Barbara, California, a small apartment occupied by Vermouth and petitioner Loomis, his girlfriend

The police executed a warrant to search this address on April 15, 1983. Upon entering the apartment, one of the officers observed Vermouth take a metal suitcase and place it in the bathroom. Loomis was observed lying in bed (Loomis Tr. 26-27). The ensuing search of the apartment resulted in the discovery of a 5-pound quantity of cocaine in the suitcase, smaller quantities of cocaine lying in open view in the kitchen, a plastic bag of cocaine in a filing cabinet used by both petitioners, and passports showing that both petitioners had travelled to Colombia, a major source country for cocaine, during 1980 (Loomis Tr. 37-40, 179, 184-186, 471-473). After the officers discovered that Loomis had rented a storage locker at a different facility, they obtained a warrant to search it and found that it contained instruments used to dilute cocaine as well as a device to test the substance (Loomis Tr. 252-254) (Pet. App. A12).

Prior to trial, both petitioners filed a motion to suppress the evidence found in locker No. 285. They claimed that the use of drug detecting dogs at the storage locker warehouse violated their Fourth Amendment rights and that the application submitted in support of the warrant to search Vermouth's locker contained material misstatements and omissions. To support the latter claim, petitioners submitted affidavits averring that, although the search warrant application stated that Ali had always proven reliable in the past in detecting drugs, the performance records of both animals reflected that they had a history of giving false alerts. In addition, petitioners contended that the animals' apparent

fatigue, cold and windy weather conditions on the day of the search, and their failure to alert to a sample amount of a controlled substance during a test run further decreased the reliability of their alerts on locker No. 285. Petitioners maintained that these factors had been intentionally omitted from the search warrant affidavit. E.R. 113-165.

In response, the government submitted the affidavit of the Customs Service official responsible for management of the detection dog program in the Service's Pacific Region. The official stated that the only proper basis for evaluating the performance records of drug detecting dogs is the Service's annual performance evaluation and that those evaluations reflected that both dogs performed with a high degree of accuracy. Petitioners' statistical data to the contrary were derived from monthly utilization reports that had no bearing whatsoever on the dogs' proven reliability. The official also stated that neither wind conditions nor the animals' prior utilization on the day in question would have affected the accuracy of their alerts, because winds enhance odors, both animals were accustomed to working outdoors, and neither was tired upon arriving at the storage facility. Supp. E.R. 191-205.

The district court denied the motions to suppress the evidence found in locker No. 285. The court first found that neither petitioner had a reasonable expectation of privacy in the storage locker because the lease that Vermouth signed permitted the proprietor to enter and remove contraband (E.R. 49). In any event, the court ruled that petitioners were not entitled to an evidentiary hearing regarding the alleged inaccuracies in the affidavit because of their failure to make the " 'substantial preliminary showing' " required by *Franks* v. *Delaware*, 438 U.S. 154 (1978) (E.R. 50). In particular, the court found that the controverted statements concerning Ali's proven track record were made in good faith, and that, in any event, even if misstatements had been

intentionally made with respect to Ali's record, they were immaterial because Dutch, who was not the subject of any claims of misrepresentation, also alerted to locker No. 285 (E.R. 51-53). With respect to the allegation that the affidavit contained material omissions concerning the dogs' inability to work outdoors during windy weather conditions or when fatigued, the court held that petitioners "failed to make a substantial preliminary showing that the dogs' reliability was adversely affected by the factors they claim existed and that the affiant intentionally or recklessly failed to include any material information in his affidavit" (E.R. 54). Instead, the court found that, because air currents and outside temperatures that are colder than the temperature within a container actually enhance odors, the omitted material would have served to further establish probable cause (E.R. 54-55).

2. Although Loomis did not testify in her own behalf, she sought to demonstrate through cross-examination of government witnesses that she was unaware of Vermouth's drug trafficking activities (Pet. App. A11-A12; see *e.g.*, Tr. 264-265, 314, 520-522). In light of this line of defense, the government proposed that the court instruct the jury, as permitted by *United States* v. *Jewell*, 532 F.2d 697 (9th Cir.) (en banc), cert denied, 426 U.S. 951 (1976), that an inference of guilty knowledge may be established by evidence of conscious avoidance of the truth. Without objection from the defense, the court stated that it would give the instruction. At the close of the trial, however, defense counsel objected to the instruction, claiming that petitioner had not "affirmatively * * * stated that she was unaware of certain acts or certain evidence that came into the case" (Loomis Tr. 630). In response, the district court stated that it was "going to mark [the proposed instruction] with a question mark and see what comes out in argument from

especially the defendant's side, and then * * * make a decision whether it is appropriate to give it" (*ibid.*). Loomis's counsel did not object to this proposed course of action and proceeded to argue in summation that Vermouth was engaged in illegal conduct without Loomis's knowledge of his dealings (Loomis Tr. 658-682). Following this argument, the district court stated that it thought that it "must give the *Jewell* instruction because of the nature of the argument of the defendant having to do with a suggestion that she had no knowledge of any of the incriminating evidence" (Loomis Tr. 682). The district court therefore gave the instruction despite petitioner's objection (Loomis Tr. 682).

3. The court of appeals affirmed both convictions (Pet. App. A3-A20). In particular, the court held that the district court properly denied an evidentiary hearing on the question whether the search warrant affidavit contained material misstatements concerning the detecting dogs' capabilities, because petitioner Vermouth failed to show that the alleged omissions in the document were intentional or reckless efforts to exaggerate the basis for probable cause and because, in any event, any misstatements concerning the capabilities of one of the dogs were inconsequential because both animals had alerted to the locker (*id.* at A6). Relying upon *United States* v. *Place*, 462 U.S. 696 (1983), the court of appeals also rejected the argument that the dog sniff of the locker area was a search triggering Fourth Amendment protections (Pet. App. A18). Addressing Loomis's claim that the evidence did not warrant a *Jewell* instruction because she did not personally testify as to her lack of knowledge of Vermouth's unlawful activities, the court of appeals held that defense counsel's questions on cross-examination and his argument were sufficient to raise the issue of deliberate ignorance (Pet. App. A11-A12). Finally, the court rejected Loomis's claim that the trial judge violated Fed. R. Crim. P. 30 by delaying the decision to give the

Jewell instruction until after closing argument. The court of appeals held that the district court sufficiently delineated its proposed action to the parties prior to argument to comply with the requirements of the rule. Pet. App. A12-A13.

ARGUMENT

1. Petitioners contend (85-966 Pet. 8-12; 85-965 Pet. i-ii & n.i) that the use of sniffing dogs to detect the odor of controlled substances emanating from Vermouth's rented storage locker violated their Fourth Amendment privacy interests. Preliminarily, as the court below observed (Pet. App. A18), we note that petitioner Loomis has never alleged any facts to indicate that she maintained a reasonable expectation of privacy in the locker. She therefore cannot challenge the propriety of the procedure on Fourth Amendment grounds. See *Rakas* v. *Illinois*, 439 U.S. 128 (1978).[5] In any event, the claim is without merit as to both petitioners and was correctly rejected by the court of appeals.

In *United States* v. *Place*, 462 U.S. 696 (1983), the Court held that a canine sniff of luggage at an airport does not constitute a search within the meaning of the Fourth Amendment. As the Court explained (*id.* at 707):

> A "canine sniff" by a well-trained narcotics detection dog * * * does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the

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[5]Although the court of appeals did hold that petitioner Vermouth had a legitimate expectation of privacy in locker No. 285 (Pet. App. A4), we question the correctness of that ruling in light of Vermouth's agreement to give the owner of the facility access to remove contraband. But there is no need to pursue this issue, because, for the reasons discussed in text, the dog sniff was not a "search" within the meaning of the Fourth Amendment.

> luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, thesniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

Thereafter, in *United States* v. *Jacobsen,* 466 U.S. 109, 123-124 (1984), the Court reiterated that a canine sniff test is not a search within the meaning of the Fourth Amendment and explained that the reason why it does "not intrude upon any legitimate privacy interest [is] that the governmental conduct [can] reveal nothing about noncontraband items." *Id.* at 124 n.24. See also *United States* v. *Beale,* 736 F.2d 1289 (9th Cir. 1984) (en banc), cert. denied, No. 84-404 (Dec. 3, 1984).

The court below therefore correctly concluded that, for purposes of the Fourth Amendment, it was inconsequential that the area subjected to the sniff test was in this case a storage locker facility (in which—apart from the locker itself—petitioner had no expectation of privacy) rather than a more public area such as an airport (Pet. App. A18). In either case, the technique does not infringe upon legitimate privacy interests, and it therefore does not constitute a search to which the protections of the Fourth Amendment apply.

As petitioners note, however (85-966 Pet. 8-9), the Second Circuit has expressed the view that *Place* does not always immunize the use of sniffing dogs from Fourth Amendment scrutiny. In the course of affirming convictions in *United States* v. *Thomas,* 757 F.2d 1359 (2d Cir.

1985), cert. denied, No. 84-1778 (Oct. 7, 1985), the court stated that the use of a sniffing dog outside the defendant's apartment to detect the presence of drugs inside constituted a search that, in the absence of a warrant, violated the Fourth Amendment. Distinguishing this Court's holding in *Place*, the court reasoned (757 F.2d at 1367 (citation omitted)):

> The Supreme Court in *Place* found only "that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a 'search' within the meaning of the Fourth Amendment." * * * Because of defendant Wheelings' heightened expectation of privacy inside his dwelling, the canine sniff at his door constituted a search.

Although we believe the Second Circuit's reasoning to be incorrect, the decision in *Thomas* and the holding of the court below have not resulted in a conflict among the circuits that requires resolution by this Court. In the first place, although *Thomas* was issued after this Court's decision in *Jacobsen*, the *Thomas* court made no reference to *Jacobsen* and failed to address the Court's explanation in that case that the reason the dog sniff in *Place* did not constitute a search was not merely because the dog was used in a public airport terminal, but because the technique did not intrude on any legitimate privacy interest in noncontraband items. *Jacobsen*, 466 U.S. at 124 & n.24. The Second Circuit should be accorded the opportunity to reconsider its reasoning in light of this Court's amplification in *Jacobsen* of the rationale underlying the Court's holding in *Place*.[6]

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[6]Because the *Thomas* court found that law enforcement officers acted in good faith reliance on a search warrant issued on the basis of the dog's alert, it refused to suppress evidence found in co-defendant Wheelings' apartment, citing *United States* v. *Leon*, No. 82-1771 (July 5, 1984),

But even ignoring the *Thomas* court's disregard of *Jacobsen, Thomas* creates no conflict with the decision of the court below, because the Second Circuit's decision was predicated upon one's "heightened expectation of privacy inside his dwelling," 757 F.2d at 1367, as compared to one's "much diminished" expectation of privacy in luggage in the custody of an air carrier at an airport (*id.* at 1366). The dog sniff in the instant case did not take place at the doorway of a private dwelling. Instead, the sniff was conducted at a warehouse, with the consent of the facility's proprietor, in a common area alongside the storage lockers. The tenants of those lockers had no privacy interest in that area and, indeed, a "much diminished" (*ibid.*) interest in the lockers themselves by virtue of their written agreements permitting entry by the proprietor for the purpose of removing contraband. Accordingly, even under the reasoning in *Thomas*, the dog sniff here would not have violated any legitimate privacy interests.[7]

2. Petitioners also claim (85-966 Pet. 12-16; 85-965 Pet. ii & n.ii) that the district court erred by failing to conduct an evidentiary hearing on their claim that the affidavit seeking

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and affirmed the conviction. Accordingly, the government did not seek further review of the case.

[7]Although the court of appeals rejected the government's argument that the terms of the rental agreement eliminated any reasonable expectation of privacy by petitioner Vermouth in locker No. 285, the court did acknowledge that the owner of the facility maintained access to it, thereby diminishing that expectation. Pet. App. A4-A5.

We also note that, contrary to petitioner Vermouth's contention (85-966 Pet. 9), the decision of the Fifth Circuit in *Horton* v. *Goose Creek Independent School District*, 690 F.2d 470 (1982), cert. denied, 463 U.S. 1207 (1983), does not conflict with the holding of the court of appeals. In that case, consistently with the decision of the court below, the court held that "the [dog] sniffs of the lockers and cars [of school students] did not constitute a search and therefore we need make no inquiry into the reasonableness of the sniffing of the lockers and automobiles." 690 F.2d at 477 (footnote omitted).

authorization to search Vermouth's locker contained misleading statements and omissions, and instead determining the issue on the basis of affidavits submitted by the parties. This fact-bound issue was resolved properly by the court below and does not warrant further review.[8]

As this Court explained in *Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978) (footnote omitted), "[t]o mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. * * * The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required." Petitioners did not meet these requirements. Although petitioners' motions to suppress alleged that the affidavit misrepresented Ali's track record and omitted relevant data concerning both dogs' ability to detect contraband when fatigued and during adverse weather conditions, petitioners made no showing whatever that the affiant had intentionally or recklessly misrepresented Ali's qualifications, which the affiant had obtained from Ali's handler, or omitted other pertinent information in order to give an exaggerated impression of the animals' capabilities. See Pet. App. A6. In any event, the alleged inaccuracies concerning Ali's record are inconsequential. Here, as in *United States* v. *Spetz*, 721 F.2d 1457, 1464 (9th Cir. 1983),

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[8]We again note that petitioner Loomis's failure to demonstrate any privacy interest in Vermouth's storage locker precludes her from seeking suppression of the evidence obtained from the locker.

Dutch's independent alert on Vermouth's locker corroborated Ali's alert and made the claimed discrepancies immaterial. See Pet. App. A6.

3. Petitioner Loomis claims (85-965 Pet. 6-13) that the district court violated Fed. R. Crim. P. 30 by delaying a final determination whether to give an instruction concerning conscious avoidance of knowledge until after her attorney had completed his summation. In particular, she maintains that the procedure adopted by the district court improperly precluded defense counsel from anticipating and addressing the instruction during closing argument. The court below correctly concluded, however, that the procedure employed by the district court did not violate Rule 30.

Fed. R. Crim. P. 30 requires the district court to "inform counsel of its proposed action upon the requests [for jury instructions] prior to their arguments to the jury." "The rule's object [is] to fairly inform the trial lawyers so that they may intelligently argue to the jury." *United States* v. *Fusaro,* 708 F.2d 17, 22 (1st Cir.), cert. denied, 464 U.S. 1007 (1983). Here, prior to the summations, the district court made it clear that whether a conscious avoidance instruction would be given would depend upon whether defense counsel argued to the jury that Loomis was unaware of Vermouth's unlawful activities, and the defense neither interposed an objection nor sought further clarification as to this course of action. See Loomis Tr. 629-630. As the court below reasoned (Pet App. A12-A13), the district court therefore announced its "proposed action" (Fed. R. Crim. P. 30) in a manner that fully accorded petitioner's counsel the ability to anticipate such an instruction, given the argument that he presented, and to address it during the argument if he considered it necessary to do so.

4. Finally, petitioner Loomis claims (85-965 Pet. 13-16) that, under the circumstances of this case, it was improper for the district court to give a conscious avoidance instruction. More specifically, she maintains that the instruction was unwarranted because the only pertinent evidence tended to show that she possessed actual knowledge of Vermouth's activities and not that she deliberately avoided knowledge of what was occurring. This fact-bound claim does not merit review.

An instruction on conscious avoidance is proper "when a defendant claims a lack of guilty knowledge and there are facts in evidence that support an inference of deliberate ignorance." *United States* v. *McAllister,* 747 F.2d 1273, 1275 (9th Cir. 1984). The justification for the instruction is that "deliberate ignorance and positive knowledge are equally culpable * * * [and that] [t]o act 'knowingly,' therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When such awareness is present, 'positive' knowledge is not required." *United States* v. *Jewell,* 532 F.2d 697, 700 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976).

As the court below correctly concluded (Pet. App. A11-A12), petitioner herself, in an attempt to prove her lack of knowledge of Vermouth's drug distribution activities, injected evidence through her questions on cross-examination of government witnesses from which it could be inferred that, if she truly lacked knowledge, her ignorance had to be the product of conscious avoidance. In addition, evidence presented by the government, such as the presence in the apartment she shared with Vermouth of large quantities of cocaine, anti-surveillance devices, and large amounts of cash and other assets far in excess of petitioners' licit income, permitted the inference that, if Loomis was as

unaware of Vermouth's activities as she claimed to be, such ignorance was deliberately calculated to avoid learning the truth.[9]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1986

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[9]This case is distinguishable from other Ninth Circuit cases, *United States* v. *Beckett*, 724 F.2d 855 (~~Cir.~~ 1984), and *United States* v. *Garzon*, 688 F.2d 607 (~~Cir.~~ 1982), upon which Loomis relies to support her claim that evidence suggesting actual knowledge of unlawful activity does not justify a conscious avoidance instruction (85-965 Pet. 14 & n.13). In *Beckett*, the uncontradicted evidence was that the defendant acknowledged to an undercover FBI agent that a bag of cocaine his roommate was selling contained that substance. In contrast to this case, therefore, nothing in *Beckett* indicated "that the defendant tried to close his eyes or ears to what was happening." 724 F.2d at 856. In *Garzon*, although the defendant claimed at trial that he had no knowledge of a cocaine transaction conducted by his father in his presence, he admittedly opened the bag containing the cocaine. 688 F.2d at 609. There was thus no evidence from which a jury reasonably could conclude that he contrived to avoid learning of the deal. *Ibid.*